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No. 83-1976

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

JOHN E. COYNE,

Petitioner,

vs.

THE STATE OF OHIO,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals, Twelfth Appellate District, Clermont County, Ohio

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BRIEF FOR THE STATE OF OHIO IN OPPOSITION

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QUESTIONS PRESENTED

I.

Whether the Petitioner was denied his Fifth, Sixth and Fourteenth Amendment rights under the Constitution of the United States by alleged prosecutorial misconduct in closing argument where Petitioner failed to make timely objection to the purportedly offensive remarks and where all remarks pertained to a single count of murder in a three count indictment for which count of murder Petitioner was acquitted.

II.

Whether the Ohio statute defining the offense of felonious assault, which requires a mental culpability state of "knowingly", combined with a jury instruction on self-defense, shifts the burden of proof in a criminal prosecution and thereby denies Petitioner his rights under the Fifth and Fourteenth Amendments to the Constitution of the United States.

III.

Whether the verdict of the jury finding Petitioner not guilty of one count of murder but guilty of two counts of felonious assault arising from a single transaction or course of conduct is inconsistent and hence contrary to law.

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OPINIONS BELOW

The Memorandum Decision and Judgment Entry of the Court of Appeals is set forth in appendix C of the Petitioner's brief. The order of the Supreme Court of Ohio denying Petitioner's Motion for Leave to Appeal from the Court of Appeals for Clermont County is set forth in appendix A of the brief of Petitioner.

JURISDICTION

The judgment of the Court of Appeals was entered on September 30, 1983. The petition for a writ of certiorari was filed on June 1, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3).

STATEMENT

The testimony presented at trial indicated that Philip Osborne, age 18, Leslie Oberschlake, age 16, and Anthony Dodson, age 16, spent the afternoon and evening hours of August 27, 1981, together. At approximately 12 midnight Osborne, Oberschlake, and Dodson decided to go to John Coyne's Boot Hill Auto Graveyard located on Twelve Mile Road in Clermont County, Ohio. The boys intended to take some batteries and radiators from the Petitioner's place of business and also hoped to acquire a spare tire for Osborne's automobile.

Osborne parked his car in a gravel lane adjacent to a small creek. The trio then proceeded up an embankment and crawled under what was later identified as the east gate of Boot Hill Auto Graveyard. At the time the boys entered the Petitioner's premises there were no lights on in the junkyard and the night was characterized as a very dark and foggy one. Osborne led the other two boys to the office where they proceeded to take radiators and batteries which were located outside of the office. The boys made approximately four or five trips carrying batteries and radiators from the office to the east gate where these items were stacked. From the east gate the boys then carried the batteries and radiators to Osborne's car where they were loaded in the back seat and trunk. Oberschlake testified that this activity took approximately 15 minutes.

The boys then re-entered the junkyard by the same gate in order to get a spare tire. This final trip into the junkyard took place at approximately 12:30 a.m. on August 28, 1981. As before, Osborne was in the lead followed by Dodson and Oberschlake. At this time, as on the previous trip into the junkyard, none of the three boys carried a weapon of any kind. Unarmed and without a light of any

kind, the trio proceeded up a lane or pathway between some junked automobiles.

Though the boys believed they were alone on the premises, they were not. At the time of the boys first entry into the Boot Hill Auto Graveyard Petitioner, John Coyne, was asleep in a Dolly Madison truck located near his office. In a statement given to police on September 1, 1981, Petitioner stated that he had been sleeping in this truck for approximately two months in order to protect his premises from break-ins and thefts. Coyne kept a Heckler and Koch .308 caliber semi-automatic rifle and a Mauser .380 automatic pistol in the truck with him.

Petitioner related to police that he had been awakened by the sound of footsteps on the gravel at approximately 12:45 a.m. on August 28, 1981. He also stated that he heard what he termed to be muffled voices. The Petitioner then dressed and armed himself with both the pistol and H. and K. rifle and proceeded first to check his office with a flashlight that he was carrying. This inspection revealed that the office had not been broken into and the lock and hasp recently placed were still intact. At this time the Petitioner thought, "I had missed the opportunity of protecting my own property". Petitioner then began to advance in the direction that he thought "the voices had trailed off to". Petitioner stated that he began exploring the eastern side of his junkyard. "I went toward the east, because that is the area I thought I heard the voices trailing off. But, I did not pursue them immediately."

It was apparently at this point that the Petitioner and the three boys crossed paths. Dodson testified that as he and the other two boys were walking up a lane, there occurred what he perceived as an explosion. Dodson stated that he dove behind a barrel and then jumped up and began

running out of the junkyard. Prior to the shooting, Dodson stated that he had seen no one, heard no warnings, and did not even know that anyone else was there. Oberschlake likewise testified that he heard no warning shot prior to the sudden barrage of rifle fire, and that no one had yelled to stop or halt. A police officer, who resided near the junkyard, testified that he heard several gunshots from that area at approximately 12:30 a.m. on August 28, 1981.

At trial a crime scene investigator from the Bureau of Criminal Investigation testified that he later found two separate and distinct shell patterns of an H. and K. .308 semi-automatic indicating that the rifle had been fired in two separate burst some 32 feet apart. The agent opined that the Petitioner had fired one burst from the rifle then pursued the fleeing Oberschlake and Dodson and fired a second burst from the rifle. He further testified that the physical evidence indicated that the Petitioner had fired the first series of ten shots, wounding Osborne in the shoulder and then passing Osborne in the darkness. After moving down the path or lane, the Petitioner fired a second burst of ten shots, then circled back up toward the office and came upon Osborne once again. At that point, the Petitioner fired the fatal pistol shot.

Meanwhile, Dodson and Oberschlake had escaped from the junkyard and returned to Osborne's car. After waiting there for a period of time, the boys walked down the road to a vacant house to seek assistance. The boys next proceeded to the Weiner residence on Twelve Mile Road and advised the residents that they had been shot and needed help. Shortly thereafter, as the boys lay on the porch, they were approached by a man with a flashlight and gun who told them to stay where they were or he would kill them. Though Oberschlake testified that the man who approached

them on the porch of Weiner residence also said that help was on the way, Dodson testified that the man, who was later found to be Petitioner, did not indicate that he had summoned help, nor that help was on the way.

Petitioner told police that after he had shot Osborne with the pistol, he then pursued the other two outside the gate. Petitioner found Osborne's automobile parked by the creek and saw thereon what he characterized as "a two-tone Christmas paint job" referring to the red blood on the green automobile. He then saw the radiators stacked in the car and this was apparently his first actual knowledge that any of his property had been stolen. After finding the two wounded boys at the Weiner residence, Petitioner returned to his junkyard and telephoned his attorney. On his arrival, the attorney asked Petitioner if assistance had been summoned, and the Petitioner indicated that it had not. The attorney then suggested calling the Sheriff's Office and asking for a life squad. Petitioner then did so.

A Clermont County Sheriff's Office Dispatcher testified that at 12:56 a.m. on August 28, 1981, Petitioner called to report an attempted breaking and entering. No mention of a shooting was made at that time. At 1:06 a.m. on the same date, John Coyne again called requesting that a life squad be sent. Though the Petitioner knew that a homicide had occurred, he again made no mention of this fact.

The first police officer to arrive on the scene reached the junkyard at approximately 1:08 a.m. He found the gates opened and all junkyard lights illuminated. Upon his arrival, the police officer was met by Petitioner and his attorney, who had already arrived at the scene. Petitioner and his counsel then pointed out Philip Osborne's body to the officer.

As a consequence of his encounter with the Petitioner, Anthony Dodson sustained a compound fracture of his right ankle and several small wounds on his back and front as well as his arm and legs. X-rays revealed metal fragments in his left arm and the soft tissue of his chest and abdomen as well as his legs and back. Dodson spent a total of 16 days in the hospital to recover from these injuries. Leslie Oberschlake suffered a laceration of the right knee and two wounds to his left big toe. In addition, he sustained multiple facial lacerations and a scalp laceration with metalic material imbedded in his parietal bone. Oberschlake was subsequently hospitalized for a period of eight days. Philip Osborne sustained two gunshot wounds, one in the chest wall and one in the upper right arm. No powder marks were found on either wound, indicating that Osborne had been shot from a distance greater than seven or eight feet. The wound to the shoulder was not considered to be a life threatening one. The pathologist stated that the cause of death was a massive hemorrhage into the chest cavity resulting from a bullet wound through the chest. The pathologist further stated that death would have occurred within five to eight minutes after the gunshot wound to the chest.

ARGUMENT

I.

Whether the Petitioner was denied his Fifth, Sixth and Fourteenth Amendment rights under the Constitution of the United States by alleged prosecutorial misconduct in closing argument where Petitioner failed to make timely objection to the purportedly offensive remarks and where all remarks pertained to a single count of murder in a three count indictment for which count of murder Petitioner was acquitted.

Petitioner asserts that the closing argument of the prosecutor consisted of a stream of innuendo, statements unsupported by evidence, testimony by the prosecutor, and improper comment on the Petitioner's exercise of constitutional privileges. These allegations are unfounded. A review of the record of this case indicates that each point raised by the prosecutor, in closing argument, was based upon facts contained in the record or inferences which could be fairly drawn from such facts. Any evaluation of the prosecutor's remarks must initially be seen in the light of three important points. First, at no time during the prosecutor's closing argument did the Petitioner see fit to interpose an objection to any point. Second, during its charge to the jury, the Court instructed the jury that "evidence does not include the indictment, opening statements, and closing arguments of counsel." Third, attorneys have been traditionally given wide latitude in closing arguments. *State* v. *Stephens,* 24 Ohio St. 2d 76, 53 O.O. 2d 182, (1970).

The Petitioner asserts that his Fifth, Sixth, and Fourteenth Amendment rights were abridged when the prosecutor, during closing argument, made reference to certain

omissions in the statements by Petitioner to police regarding the events which transpired in the late evening hours of August 27, 1981, and the early morning hours of August 28, 1981. Specifically, the Petitioner takes exception to the prosecutor's act of pointing out to the jury that in Petitioner's two phone calls to the Clermont County Sheriff's Office, he did not advise the police that a person had been shot to death on his premises.

Initially, it must be noted that the prosecutor's references to Petitioner's failure to report the slaying of Osborne in either of his two telephone calls to the Sheriff's Office is supported by the record. As noted earlier, Petitioner telephoned the Sheriff's Office at 12:56 a.m. and simply reported an attempted breaking and entering. He did not, at that time, even mention that a shooting had occurred, let alone indicate that a young man had been killed. The second telephone call placed by the Petitioner to the Sheriff's Office occurred at 1:06 a.m. and though the Petitioner did request a life squad there was still no mention of the fatality. It is therefore apparent that each of these facts presented by the prosecutor in his closing argument were documented in the record and that testimony pertaining to these facts had been presented to the jury without any objection by Petitioner.

The cases cited by Petitioner in support of his position are inapposite and can be readily distinguished from the case now before this Court. In *United States* v. *Brinson,* 411 Fed. 2d 1057 (1969), the Sixth Circuit Court of Appeals declared that the failure of a defendant to deny accusations while in *custody* cannot be referred to in evidence as a tacit admission. To support this conclusion the Court cited *Miranda* v. *Arizona,* 384 U.S. 436, 16 L.Ed. 2d 694, 86 S. Ct. 1602 (1966). In *Miranda,* the United States Supreme Court stated:

> ". . . it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecutor may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation."

United States v. *McKinney,* 379 Fed. 2d 259 (1967), also involved the use by the prosecution of a tacit omission, or omission by silence of a defendant. In reversing the conviction below, the Court observed that:

> "permitting this omission (by silence) to be received into evidence therefore controvened Appellant's right under the Fifth Amendment to remain silent *when in custody* and accused of a crime."

The Petitioner also cites *United States* v. *Nolan,* 416 Fed. 2d 588 (1969). In *Nolan,* the defendant had been arrested by the FBI for the interstate transportation of a stolen motor vehicle. Upon his arrest, defendant was given his Miranda warnings and made no statement to authorities. At trial, the defendant stated that he had gotten the automobile in California in response to an ad in the newspaper for someone to drive a car to the East Coast, and that he did not know the car was stolen. In closing argument, the federal prosecutor stated that if this account was true, then the normal thing for the defendant to do would have been to say something about it at the time of his arrest. The Court found this remark to be impermissible stating that when the accused was taken into custody he had a right to remain silent.

This brief review of the case as cited by Petitioner reveals that there is a common theme running through each of the four cases. In each of these cases the accused had been placed under arrest and was actually in custody at

the time the tacit admission or omission occurred. Indeed, in *United States* v. *Nolan,* the defendant had actually been given his so called Miranda rights and thereafter elected to make no statement.

It is apparent that these cases do not control the issue which has been raised by the Petitioner. The prosecutor's remarks pertaining to the Petitioner's two telephone calls to the Sheriff's Office and his failure at that time to report a killing on his property constitute a fair comment upon the evidence presented and do not interfere with Petitioner's constitutional privileges. The contact with police during the two phone calls was initiated by Petitioner himself. Petitioner was not under arrest, nor was he in custody. No interrogation occurred and the information that was given was given voluntarily by the Petitioner. If in retrospect it appears that the Petitioner omitted to give certain crucial information in his phone calls, that ommission is certainly fair game for the prosecutor.

II.

Whether the Ohio statute defining the offense of felonious assault, which requires a mental culpability state of "knowingly", combined with a jury instruction on self-defense shifts the burden of proof in a criminal prosecution and thereby denies Petitioner rights under the Fifth and Fourteenth Amendments to the Constitution of the United States.

For his second issue, the Petitioner claims that under Ohio law when one is charged with felonious assault. It raises the affirmative defense of self-defense, the burden of proof is shifted to the defendant. This phenomenon occurs, according to Petitioner, because the statutory defini-

tion of "knowingly", the culpable mental state in felonious assault, states, in part, that one acts knowingly ". . . regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature." § 2901.22 (B), O.R.C. Since self-defense is purposeful conduct and felonious assault can be committed without regard to one's specific purpose or intent, Petitioner concludes that the mental element of felonious assault somehow vitiates the claim of self-defense. This argument proves unsuccessful for two reasons.

First, the Petitioner did not object to the definition of "knowingly" prior to the time the jury retired to deliberate. Rule 30 of the Ohio Rules of Criminal Procedure states that a party may not assign as error the giving or the failure to give any instructions unless he objects before the jury retires to consider its verdict, stating specifically the matter to which he objects and the grounds of his objection. This was not done in the instant cause and the objection which Petitioner seeks to raise at this point must be deemed to have been waived. *State* v. *Underwood,* 3 Ohio St. 3d 12 (1983).

Furthermore, even if one should determine that this claim of error was not waived at trial, the argument advanced by Petitioner is untenable. Petitioner asserts that because the definition of knowingly contains the phrase "regardless of his purpose" that the allocation of the burden of proof has somehow been shifted from the State to the defendant. Yet, this is not the case. In *Isaac* v. *Engle,* 646 Fed. 2d 1129 (1980), a Sixth Circuit Court of Appeals case relied upon by Petitioner, the Court stated that the defense of self-defense does not negate any element of the crime of felonious assault; that is, it does not put into issue any of the elements of the offense. Instead, such an affirmative

defense constitutes a separate issue. This point was expressed very aptly in Judge Lively's dissenting opinion in *Isaac* v. *Engle*. Referring to the Ohio Supreme Court's holding in *State* v. *Poole,* 33 Ohio St. 2d 18, 62 O.O. 2d 340, 294 N.E. 2d 888 (1973), Judge Lively made the following pertinent observation:

> "it (self-defense) is in the nature of a civil plea of confession and avoidance—it admits the facts claimed by the prosecution to establish an offense, but relies on the existence of a separate set of facts or circumstances which the law recognizes as an excuse. When established, this excuse exempts the defendant from liability . . . The jury does not reach a defense of self-defense until it finds that all elements of an offense have been established beyond a reasonable doubt. Thus, there is no impermissible shifting of the State's burden."
> (646 Fed. 2d, 1139)

It is thus apparent that, contrary to Petitioner's argument, the jury is not required to consider both the elements of felonious assault and the elements of self-defense simultaneously. Rather, the jury must first review the evidence in order to ascertain whether each and every element of the charge of felonious assault has been proven beyond a reasonable doubt. This would, of course, include the element of *mens rea*. If, and only if, the jury determines that all elements of the offense of felonious assault have been established by the requisite degree of proof, does the jury then go forward and consider the defendant's claim that he acted in self-defense. Therefore, while the jury does not consider the actor's purpose in determining whether felonious assault has, in fact, been committed, the jury most certainly does consider the actor's purpose or intent in determining whether that felonious assault was justified under the law of self-defense. When viewed in this light, it

is abundantly clear that the mental elements of felonious assault and self-defense do not negate one another and that the combination of the two does not operate to impermissibly shift the burden of proof to the defendant.

III.

Whether the verdict of the jury finding Petitioner not guilty of one count of murder but guilty of two counts of felonious assault arising from a single transaction or course of conduct is inconsistent and hence contrary to law.

Petitioner contends that the verdict of the jury finding him guilty of two counts of felonious assault is contrary to law in that it is purportedly inconsistent with the jury's verdict finding him not guilty of the murder of Philip Osborne. Even assuming, arguendo, that the verdicts were inconsistent, such inconsistency is not sufficient for reversing Petitioner's conviction. In *Harris* v. *Rivera,* —— U.S. ——, 70 L.Ed.2d 530, 535-536, 102 S. Ct. —— (1981), this Honorable Court made the following pertinent observation:

> "inconsistency in a verdict is not a sufficient reason for seting it aside. We have so held with respect to inconsistency between verdicts on separate charges against one Defendant, *Dunn* v. *United States,* 284 U.S. 390, 76 L.Ed. 356, 52 S. Ct. 189, and also with respect to verdicts that treat co-Defendants in a joint trial inconsistently, *United States* v. *Dotterweich,* 320 U.S. 277, 88 L.Ed. 48, 64 S. Ct. 134."

A similar conclusion was reached by an Ohio appellate court in *State v. Jones,* 47 O. App. 2d 8, 1 O.O. 3d 156 (1975). In *Jones,* the accused contended that the jury's verdict finding him guilty of murder, but not guilty of felonious assault on another individual, all occurring in a

single transaction, was not sustained by sufficient evidence and was contrary to law in that it was inconsistent and irregular. The Court of Appeals found this claim of error to be without merit.

> "It is noted that there were two victims and separate crimes charged as to each victim. It does not necessarily follow that intent or lack of intent regarding a crime committed against one victim is transferred to, and becomes the intent, in regard to the crime charged against the other victim. It is possible for a person charged with two separate crimes to have intent or lack of intent as to each of the victims independently of the other." (1 O.O. 3d, 159)

By the same token, it does not necessarily follow that a finding of self-defense regarding a crime committed against one victim is transferred to and becomes a valid justification in regard to crimes charged against other victims. *United States* v. *McQueeney,* 674 Fed. 2d 109 (1982) .

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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June, 1984